UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS INCORPORATED, et al. Defendants.	Civil Action No. 99-CV-02496 (GK)

LETTER OF REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE
(Nicholas Cannar)

TO THE REGISTRAR OF THE SUPREME COURT OF NEW SOUTH WALES, SYDNEY, AUSTRALIA, NSW 2000:

The United States District Court for the District of Columbia presents its compliments to you and requests your assistance in the following manner:

WHEREAS, this proceeding is properly under the jurisdiction of and is now pending before the United States District Court for the District of Columbia located in Washington, District of Columbia, United States of America, between plaintiff United States of America and defendants Philip Morris, Inc.; Philip Morris Companies, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Company; British American Tobacco (Investments) Ltd.; Lorillard Tobacco Company; American Tobacco Company; The Liggett Group, Inc.; The Council for Tobacco Research – U.S.A., Inc.; and The Tobacco Institute, Inc., as shown in the Amended Complaint (attached as Exhibit 1);

WHEREAS, the claims asserted in this action arise out of violations of United States racketeering laws under 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d). Section 1962(c) prohibits "any person employed by or associated with any enterprise" engaged in or affecting interstate or foreign commerce from "conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) prohibits a conspiracy to violate any of the other provisions of 18 U.S.C. § 1962. Racketeering activity is "defined as behavior that violates certain other laws, either enumerated federal statutes or state laws addressing specified topics and bearing specified penalties." Rotella v. Wood, 528 U.S. 549, 552, 120 S. Ct. 1075, 1079 (2000) (citing 18 U.S.C. § 1961(1)). Civil racketeering activity may include, but is not limited to, a conspiracy to commit fraud or other intentional tortious conduct, and a civil racketeering action may be brought by an individual, corporation, or government entity.

Paragraph 174 of the Amended Complaint in this action alleges that not later than 1953, Defendants formed an enterprise and entered into a conspiracy, which was reaffirmed by subsequent explicit and implicit agreements, to deceive consumers into starting and continuing to smoke, without regard to the truth, the law, or the health consequences to the American people by:

(1) fraudulently maintaining that there was an open question as to whether smoking causes disease, despite the fact that defendants knew otherwise;

(2) concealing and suppressing relevant research on the health consequences of smoking and funding biased or irrelevant research on the health consequences of smoking, while publicly claiming to do everything in their power, including fund independent research, in order to determine if smoking causes cancer or other diseases;

(3) deceiving consumers into becoming or staying addicted to cigarettes by claiming that nicotine is not addictive, despite the fact that defendants knew that nicotine is addictive;

(4) manipulating the design of cigarettes and the delivery of nicotine to smokers to maintain and enhance the addictiveness of cigarettes, while at the same time denying that they engaged in such manipulation;

(5) marketing and advertising "light" and "ultra-light" cigarettes as conferring health benefits over other cigarettes, despite their knowledge that no such health benefits existed; and

(6) marketing and advertising with the intent of addicting children into becoming lifetime smokers, while claiming that they did not market to children.

WHEREAS, it appears that it is necessary for the purpose of justice and for the due determination of the matters in question between the parties that Nicholas Cannar, within your jurisdiction should be called upon to provide certain evidence relating to those matters.

Mr. Cannar's home address is as follows: Mr. Nicholas Cannar, 62 Cope Street, Lane Cove, NSW 2066, Australia.

In support of its Motion to this Court for the issuance of a Letter of Request, the Plaintiff has offered the following information, set forth in the numbered paragraphs below, all of which are allegations of the Plaintiff and are not findings of this Court:

1. Mr. Cannar is the former long-time Senior Solicitor and head of the legal department for BATCo in the United Kingdom. The United States alleges that Mr. Cannar's responsibilities included devising and implementing document management policies for BATCo in the U.K., and also for the implementation of BATCo's worldwide document management,

retention, and destruction policies. This included setting requirements of document retention and destruction for BATCo operating companies throughout the world. Employees of the various operating companies were required to follow these policies - including, among other things, to destroy documents in accordance with certain schedules. One such BATCo operating company was W.D. & H.O Wills ("Wills"), at one time a wholly-owned BATCo subsidiary in Australia, later known as B.A.T. Australia Services Ltd. ["BATAS"]. Mr. Cannar also had a responsibility for managing the flow of documents between BATCo and its United States affiliate, Brown & Williamson, and also the exchange of documents and information among BATCo's various operating companies (including Wills), and Brown & Williamson.

2. Later, in the mid-1990's, Mr. Cannar moved from BATCo in the U.K. to work full-time at Wills in Australia. He held several roles with Wills, and was, among other things, an attorney with responsibility for document management, retention, and destruction at Wills.

3. Plaintiff, the United States, alleges that in those capacities Mr. Cannar participated in the development and implementation of a document management policy, that resulted in the destruction of relevant documents, for the purpose of preventing the discovery of certain sensitive documents in litigation in the United States and otherwise. In McCabe v. British American Tobacco Australia Services Ltd., [2002] VSC 73 (Supr. Ct. of Victoria at Melbourne (Australia) Mar. 22, 2002) (copy attached as Exhibit 2), the Supreme Court of Victoria struck BATAS's defenses on the basis that it destroyed potentially relevant documents when faced with impending litigation. In its decision, the McCabe court concluded that:

> The role of Cannar is of considerable importance, and his absence from the witness box is glaring. He was involved in the development of the Document

> Retention Policy from at least 1990, when as Senior Solicitor for BATCO he visited Australia for talks with Gulson and Australian solicitors from Clayton Utz and Allen Allen & Hemsley. His name emerges constantly. He was present when Wilson advised in conference on 2 April 1990, "as to the rest, get rid of them".

McCabe, ¶ 165.

4. The United States alleges that, among other things, Mr. Cannar participated in policies and practices that resulted in the destruction of relevant documents in the U.K. and elsewhere, including Australia. Furthermore, documents determined to have been destroyed by an Australian Court are relevant to the United States' claims in its Amended Complaint in this action, and the document destruction policies and practices identified by the Australian court involved actions of BATCo employees and agents.

5. The United States has reason to believe that Mr. Cannar not only directed the destruction of responsive documents located within the U.K., but also the destruction of responsive documents in Australia and elsewhere.

6. On September 10, 1985, Mr. Cannar and another attorney from BATCo's U.K. headquarters, Anne Johnson, wrote that it was clear that BATCo's research and development documents, located in the U.K. and elsewhere, would be subject to discovery in the United States in the very likely event of litigation against Brown & Williamson. As a result, Cannar and Johnson recommended "a full review of GR&DC's [BATCo's research and development facility] research reports and document files . . . in view of their potential impact in any law suit." (Memorandum dated September 10, 1985, Cannar and Johnson to Bruell and Heywood,

cc's to Herd and Thornton, entitled "Smoking Issues" (Bates Nos. 107333990 - 3991) at 1) (annexed hereto as Exhibit 3). Mr. Cannar and Ms. Johnson wrote that the review:

> will be started by BATCo's own in-house lawyers who will at the same time begin the process of educating a firm of UK solicitors into the complexities of smoking and health issues so that in due course this firm will be available to provide advice and additional man power.
>
> . . . . It would also be helpful to identify another non-lawyer in addition to Ray Thornton (who already has many demands on his time) with the necessary scientific background coupled with an awareness of the legal sensitivities to assist in the review."

(Id. at 1-2.) A long series of communications and advice from BATCo's in-house and outside counsel followed, relating to the topic of avoiding discovery in U.S. litigation among other things.

7. On February 25, 1986, Mr. Cannar and Ms. Johnson met with Ray Pritchard, the Chief Executive Officer of Brown & Williamson, (who was also a member of parent BAT's Board) and Ernest Pepples, an internal counsel for Brown & Williamson. (See, e.g., Note, Johnson and Cannar to Bruell, entitled "Litigation Against BAT Companies: Research," dated February 26, 1986, Bates Nos. 109870594 - 0596) (copy attached as Exhibit 4.). According to a note that Mr. Cannar co-authored, at that meeting Mr. Pritchard set forth Brown & Williamson's position on scientific research and information, stating that:

> B & W's position is that: -
>
> . . . .
>
> (ii) decisions to undertake research should be managerial decisions not scientific decisions.
>
> (iii) research into product modification eg. [sic] biological activity, CO [carbon monoxide] etc. should not be done because

(a) there is no immediate or real commercial need (tar and nicotine being the only relevant/required indices); and

(b) discovery of such research could prejudice B&W's chances of defending litigation.

(iv) smoking and health research should not be undertaken except in relation to major fundamental research projects . . .

(v) information/document distribution should be kept to a minimum to avoid documents becoming available to plaintiff in litigation. Information should be available on a "retrieval" rather than a "dispersal" basis.

(Id. at 1.)

8. In a second memorandum a month later, Mr. Cannar and Ms. Johnson again summarized B&W's views:

(2) Smoking and Health
Brown & Williamson are opposed to any research which has any relevance to the smoking and health issue other than providing financial support if this is thought necessary to broadly based external research programmes e.g. genetic mechanisms of disease.

(Memorandum dated March 24, 1986, Cannar and Johnson (so identified in previous defendant privilege logs) to Baker, then BATCo General Counsel (and Mr. Cannar's predecessor), entitled "Note for the Tobacco Strategy Review Team: Tobacco Research in the B.A.T. Industries Group" (Bates Nos. 301122650 - 2654), at 2) (copy attached as Exhibit 5).

9. Two months later, in May 1986, Mr. Cannar, Ms. Johnson, and Ray Thornton, a BATCo scientist, met with two attorneys from Lovell White & King (later Lovell White Durant ["Lovells'] BATCo's long time U.K. litigation counsel) to discuss document retention and destruction policies. According to minutes from that meeting:

> NBC [N.B. Cannar] said that Mr. Sheehy [Sir Patrick Sheehy, then BATCo Chairman] did not wish it to be seen that BATCO had instituted a destruction policy only when the possibility of their being involved in litigation became real and after they had instructed solicitors. Thus, it was decided that no destruction policy should be adopted, rather that R&DC [Research & Development Centre] would tidy up the loose papers held by individuals, which "spring clean" could involve the destruction of documents such as previous drafts.
>
> . . . . It was agreed that such a "spring clean" of all of the loose papers held outside the official filing systems is essential to enable L.W.&K.'s "task force" to carry out stages I and II (the listing and reviewing of the files).

(Minutes dated May 21, 1986 of May 15, 1986 meeting of Cannar, Johnson, Thornton, Foyle, and Maas [another Lovell attorney]) (Bates Nos. 107443680 - 3689), at 3) (copy attached as Exhibit 6).

10. Furthermore, as recent as, May 30, 2002, Kay Kinnard (nee Comer), current document compliance manager for the BAT Group, and long time compliance manager of BATCo's document management program, related that she was seconded to the BATCo Legal Department for 2 years, from roughly 1985-87. (Kinnard Depo. Day 1 (May 30, 2002) at 170) (copy attached as Exhibit 11). Mr. Cannar was head of the legal department at that time, and had contact with Ms. Kinnard during that period. (Kinnard Depo. Day 2 (May 31, 2002) at 23) (copy attached as Exhibit 12). Mr. Cannar was Ms. Kinnard's manager with respect to her involvement in the two year "legal project" of reviewing all BATCo research and development documents after being trained for 4-6 weeks by Lovells. (Kinnard Depo. Day 2 (5/31/02) at 72.) The result of this project was a database of BATCo's research and development documents at Lovells.

11. In 1988, Mr. Cannar and Ms. Kinnard were copied on a letter from Lovell's Andrew Foyle to BATCo scientist Ray Thornton advising him on how to get attorney-client privileges to attach to scientific information:

> I referred earlier to our desire to create a modus operandi to ensure that legal professional privilege is not lost. Because correspondence on the subject of Buerger's disease exchanged between you and your colleagues in other companies might not be privileged, it is important that contact between the scientists should be routed through the lawyers. In addition, you should ensure that any internal memoranda written on the subject of Buerger's disease in relation to the current investigations should be captioned "Privileged and Confidential".

(Letter dated March 21, 1988, Foyle to Thornton, cc. to Cannar and Comer, entitled "Buerger's Disease" (Bates Nos. 300517039 - 7040) at 2) (copy attached as Exhibit 7).

12. In January 1990, Mr. Cannar wrote to Stuart Chalfen, counsel for BAT Industries p.l.c., referring to a meeting of Mr. Cannar, Mr. Chalfen, and the in-house lawyers from the various BAT companies with research and development facilities (including Brown & Williamson) to discuss ways to reduce the circulation among BAT companies of research documents addressing "sensitive topics," in order to reduce litigation concerns. (Memorandum dated January 4, 1990, Cannar to Chalfen, entitled "Research Documents" (Bates Nos. 202347088 - 7090), at 2) (copy attached as Exhibit 8). Two weeks later, Mr. Cannar wrote a "Research Documents Agenda." The Agenda's "concern" was "volume of research documentation spread around the Group," and its first "issue/proposal" was to "[r]estrict current flow of research related reports." (Agenda dated January 17, 1990, Cannar, entitled "Research Documents" (Bates Nos. 202347085 - 7086) at 1) (copy attached as Exhibit 9). Mr. Cannar and J. Kendrick Wells, a Brown & Williamson lawyer, communicated regarding their worry that if a

U.S. plaintiff sued Brown & Williamson and contended that Brown & Williamson were involved in a conspiracy, "BATCo would be subject to direct discovery against documents and employees." (Letter dated April 10, 1990, J. Kendrick Wells to Nick Cannar, entitled "Current Smoking and Health Legal Matters" (Bates Nos. 680800858 - 0865) at 7) (copy attached as Ex. 10).

13. Furthermore, Mr. Cannar went to Australia for an April 2, 1990, conference with Wills's lawyers to discuss the company's document retention policy.[1] At this meeting, a solicitor for Clayton Utz, which represented Wills, provided the following advice:

> "Keep all research docs which became part of public domain and discover [i.e., produce] them.
>
> "As to other documents, get rid of them, and let other side rely on verbal evidence of people who used to handle such documents."

McCabe, ¶ (copy attached as Exhibit 2). The meeting culminated in the following decision: "To shred all docs in Aust more than 5 yrs old (docs will still be available offshore, though)." Id., ¶ 43.

14. In 1991, Mr. Cannar invited Ms. Kinnard to become compliance manager in the BATCo Legal Department with responsibility for worldwide compliance with BATCo' s new document management policy. (Kinnard Depo. Day 1 (May 30, 2002) at 167-69) (ex. 11). Mr. Cannar, Ms. Kinnard, and David Schechter, a Brown & Williamson lawyer, were responsible for devising this policy, presenting it to BATCo's Board, and then implementing the uniform policy across all BATCo's operating companies, including Wills. Employees of the operating

[1] J. Kendrick Wells' April 10, 1990 letter refers to an earlier version having been previously faxed to Mr. Cannar "in an effort to catch you before departure for Australia." (Ex. 10, at 8.)

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companies, including Wills, were required to follow this policy. Ms. Kinnard remained in that position, reporting to Mr. Cannar (Id. at 166.) Under the policy, BATCo operating companies were required to destroy documents, certain of which related to smoking and health matters. (Kinnard Depo. Day 2 (May 31, 2002) at 134) (ex. 12). Mr. Cannar, as head of Wills's legal section in Australia, oversaw discovery in the Cremona case.[2] Wills's in-house solicitor Graham Maher warned Mr. Cannar "that adverse inferences could be drawn [from disposing of the documents] and that the propriety of the company engaging in this process of destruction of documents, which would or might prejudice the case of any future plaintiff, could be a subject of comment by a court." McCabe, ¶ 140. Mr. Maher testified that he and Mr. Cannar limited their discussion to their obligations arising from "proceedings that had commenced, and did not

[2] Wills identified some 30,000 documents as possibly relevant to Cremona, and spent on the order of 2 million dollars indexing, summarizing, and imaging them. McCabe, ¶ 112. A database housed at the firm Mallesons Stephen Jacques was thereafter created. The documents in this database were later reviewed by BATCo employees and agents, including Dr. Christopher Proctor. One purpose of these assessments was to compare the documents held by Wills with those held elsewhere by BATCo. The database was later destroyed because, the McCabe court found, Wills and BATCo sought to protect their present and future litigation positions in Australia, the United States, and elsewhere. The Cremona database was "a very useful tool. Given that it also contained a rating of importance of the documents, and of their 'knockout' capacity, a person in the position of [Wills attorney Graham] Maher or Cannar could very quickly have identified the documents of most danger to the defendant in any litigation." Id., ¶ 120. In early 1998 (on or before March 8, 1998), after the Cremona proceedings ended, Mr. Cannar directed that all unnecessary documents be disposed of: "[N]ow is a good opportunity to dispose of documents if we no longer need to keep them. That should be done outside the legal department." Id.,¶ 128. Mr. Cannar specifically directed Mr. Maher to have the Cremona documents destroyed. Id., ¶ 152, 156. On March 11, 1998, Robyn Chalmers, a partner at Mallesons Stephen Jaques, met with Mr. Cannar and Mr. Maher and, she testified, "expressly queried the purpose for the destruction and also whether there were any further proceedings anticipated." Id., ¶ 141. Ms. Chalmers received incomplete information in response to such queries. Id., at ¶ 147. The McCabe court found that "Cannar[] would have known perfectly well (having regard to earlier advice) that innocent motives had to be asserted by the company. Mr. Cannar knew that Ms. Chalmers would be placed in an embarrassing position if dishonourable motives (and recognition of the high probability of further proceedings) were admitted." Id., ¶ 151. Department managers were told they had to confirm compliance with the policy by April 15, 1998 Id., ¶ 154. "In my opinion, it is perfectly plain that a window of opportunity was perceived by Cannar, and probably others, upon the completion of the Cremona and Harrison proceedings, there then being no proceedings on foot." Id, ¶ 131.

mention anticipated proceedings." Id., ¶ 145. Despite Mr. Maher's warnings, Mr. Cannar nonetheless concluded that the program should proceed. Id., ¶ 156.

15. Paragraphs 33, 36, 45, and 204(d) of the Amended Complaint in this case (attached as Exhibit 1) specifically allege that defendants, including BATCo, destroyed smoking and health-related documents.

WHEREAS, this Court is authorized by Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 to issue this Letter Rogatory to the appropriate judicial authority in Australia requesting assistance in this matter;

NOW THEREFORE, I, Gladys Kessler, United States District Court Judge, pursuant to Rule 28(b) of the Federal Civil Judicial Procedure and Rules, hereby request that, in furtherance of justice and by the proper and usual process of your court, you summon Nicholas Cannar to appear before you or some competent person appointed by you, at a time and place by you to be fixed, for the purpose of the giving of his evidence in the proceedings recited herein relating to the following matters;

1. The creation of the document management policy:

    1.1 Time of creation of the document management policy;

    1.2 Individuals responsible for creation of the document management policy;

    1.3 BATCo's connection to the creation of the document management policy;

    1.4 Brown & Williamson's connection to the creation of the document management policy;

    1.5 BAT's connection to the creation of the document management policy;

1.6 Effect of prospective litigation on the creation of the document management policy;

1.7 Awareness of prospective litigation at the time of the creation of the document management policy;

1.8 BATCo litigation at the time of the creation of the document management policy;

1.9 Brown & Williamson litigation at the time of the creation of the document management policy;

1.10 BAT litigation at the time of the creation of the document management policy;

1.11 Purpose of the creation of the document management policy;

1.12 Individuals who were aware of the creation of the document management policy;

1.13 Individuals who were aware of the purpose of the document management policy;

2. The implementation of the document management policy:

2.1 Time of implementing the document management policy;

2.2 BAT entities that implemented the document management policy;

2.3 Individuals with responsibility for implementing the document management policy;

2.4 Effect of implementing the document management policy upon litigation;

2.5 Effect of implementing the document management policy upon prospective litigation;

2.6 Effect of implementing the document management policy upon record keeping at BATCo;

2.7 Effect of implementing the document management policy upon record keeping at Brown & Williamson;

2.8 Effect of implementing the document management policy upon record keeping at BAT;

2.9 Effect of implementing the document management policy upon the dissemination to the public of smoking and health related scientific reports;

2.10 Effect of implementing the document management policy upon the dissemination to the public of youth marketing information;

2.11 Effect of implementing the document management policy upon the dissemination to the public of information about the health effect of "low tar" cigarettes;

2.12 Effect of implementing the document management policy upon the dissemination to the public of information on addiction;

2.13 What documents were destroyed;

2.14 Information contained in documents that were destroyed;

2.15 Ownership of destroyed documents;

2.16 Authors of destroyed documents;

2.17 Nature of destroyed documents;

2.18 Representations made in destroyed documents;

3. Rules and procedures set forth by document management policy

3.1 Documents subject to the document management policy;

3.2 Selection of documents to be destroyed;

3.3 Selection of documents to be saved;

3.4 Destruction of original documents;

3.5 Destruction of copies of documents;

3.6 Creation of a database or databases for sensitive documents;

3.7 Status of databases for sensitive documents;

3.8 Individuals' access to sensitive documents;

3.9 BATCo's access to sensitive documents;

3.10 Brown & Williamson's access to sensitive documents;

3.11 BAT's access to sensitive documents;

3.12 Changes to the document management policy;

3.13 Effect on BATCo;

3.14 Effect on Brown & Williamson;

3.15 Effect on BAT;

3.16 Treatment of subject matter under the document management policy;

16.1 Smoking and health;

16.2 Addiction;

16.3 Youth marketing;

16.4 Low tar;

4. Destruction of smoking and health documents that pertain to BATCo and Brown & Williamson's litigation position in the United States;

4.1 Document destroyed in the U.K.;

4.2 Documents destroyed in the United States;

4.3 Documents destroyed in Australia;

4.4 Documents destroyed elsewhere;

5. Transportation, routing, storage, and warehousing of documents;

5.1 Intentional warehousing of documents at law firms or in certain jurisdictions to shield document from discovery;

5.2 Creation, maintenance, and destruction of document databases or other electronic records;

and that you will cause his testimony to be committed to writing and be videotaped, and that the transcript and videotape and any exhibits thereto be sent to: Sharon Y. Eubanks, Civil Division, Torts Branch, United States Department of Justice, 1331 Pennsylvania Avenue, Suite 1150, Washington, D.C. 20004, U.S.A.;

and that you will permit the United States to participate by United States Department of Justice counsel and by local Australian counsel.

This Court also requests that - should you deem it appropriate - the United States be allowed to propound written interrogatories to Mr. Cannar concerning the topics given above, to be answered under oath.

This Court expresses its appreciation to you for your courtesy and assistance in this matter and states that, pursuant to the authority of 28 U.S.C. § 1782, it stands ready and willing to do the same for you in a similar matter when required.

Oct. 3, 2002
Date

Gladys Kessler
Gladys Kessler
United States District Judge

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